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# 商事仲裁的私法性与中国商事仲裁的国际 化

The Private Nature of Commercial Arbitration and the  
Internationalization of Commercial Arbitration in China

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## 内 容 摘 要

我国《仲裁法》出台距今已二十年了，在商事仲裁快速发展的情况下，出现了许多立法滞后与立法空白的情况，因此司法机关的解释将对仲裁法的适用发挥了很大作用。然而司法机关认为商事仲裁领域也应秉承“法无授权皆禁止”的原则，对商事仲裁有着公法性认识。当前表现尤为突出的是，禁止当事人将无涉外因素的商事争端提交境外/外国仲裁机构，和拒绝对国际仲裁机构在中国境内作出的商事仲裁裁决的承认与执行。由此，中国商事仲裁之“走出去”和“引进来”的两个国际化的趋势，被中国仲裁司法监督体制禁止。本文认为这极不符合商事仲裁意思自治和私法领域契约自由的精神，对“无涉外因素”商事争端的当事人也是极不公平的差别待遇。因此，本文将通过对司法机关妨碍中国商事仲裁“引进来”和“走出去”的逻辑的考察，对商事仲裁的性质、仲裁协议的准据法、仲裁市场的开放、仲裁国籍的识别、互惠保留的效果、“双轨制”等我国仲裁法律体系和司法实践问题进行实证分析，并以国际商事仲裁的私法性为立足点，强调司法机关在适用现行仲裁法律时对“法无禁止皆自由”原则的运用，及在立法上对仲裁法修订提出仲裁机关体制改革、取消双轨制、树立当事人的意思自治和仲裁庭管辖权自裁原则的建议，以进一步从立法上带动我国商事仲裁的国际化 and 自由化。

**关键词：**商事仲裁；私法性；国际化





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## ABSTRACT

The PRC Arbitration Law (hereinafter “PAL”) has been promulgated for twenty years and is falling far behind the rapid development and growth of commercial arbitration practice in China. While the scheduled amendment of the PAL is still up in air, the interpretation and general attitude of the judicial authorities toward arbitration practice not provided in the law when exercising the supervisory power is decisive and of vital importance. However, cases show the courts hold a very conservative position regardless of the paramount principle of party autonomy in commercial arbitration, and tend to prohibit practices not “authorized” by the law. Two exceptional scenarios are commercial dispute without “foreign elements” are not allowed to submit to international arbitration institutes, which is very discriminative treatment towards parties of such disputes, and the awards made by international arbitration institutes within territory of China has been facing serious legal risk of non-enforcement. In this way, both the trend of “going out” and “bring in” of commercial arbitration is jeopardized by the Chinese judicial apartment, thus the liberalization and internationalization of commercial arbitration in China. In light of this, this dissertation will examine and analyze the very logic and considerations behind the interventions by courts upon freedom of parties and arbitral tribunals, by discussing disputable issues including the very nature of commercial arbitration, the applicable law of arbitration agreement, the nationality of arbitral award, the “dual-track” system of China, the legal effect of reciprocity reservation under New York Convention etc. This dissertation is of the position that commercial arbitration is private nature and is an area of private law, thus the principle of “those not prohibited by the law is not law-breaking” should be adopted by the courts, and refrain from intervening the liberal development of arbitration. Furthermore, the future amendments to the PAL should promote the reformation of the current “administratively monopoly” of arbitration commission system, the opening-up of

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commercial arbitration market, the abolishment of “dual-track” system, and should establish the principle of party autonomy and *competence-competence*. Only in this way can the liberalization and internationalization be legislatively recognized and guaranteed legislatively.

**Key Words:** Commercial arbitration; Private law nature; Internationalization

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## 缩略语表 (Abbreviations)

<b>&amp;</b>	And
<b>Para.</b>	Paragraph
<b>CIETAC</b>	China International Economic and Trade Arbitration Commission
<b>CISG</b>	United Nations Convention on Contracts for the International Sale of Goods
<b>CMAC</b>	China Maritime Arbitration Commission
<b>Co.</b>	company
<b>Corp.</b>	corporation
<b>de facto</b>	used to indicate that something is a particular thing, even though it was not planned or intended to be that thing
<b>ed.</b>	edition
<b>et al.</b>	et alii (and others)
<b>FAA</b>	Federal Arbitration Act
<b>HKIAC</b>	Hongkong International Arbitration Centre
<b>i.e.</b>	id est (that is)
<b>IBA</b>	International Bar Association
<b>ICC</b>	International Chamber of Commerce
<b>ICCA</b>	International Council of Commercial Arbitration
<b>Inc.</b>	incorporated
<b>lex arbitri</b>	law of the place where arbitration is to take place
<b>Ltd.</b>	limited
<b>NYC</b>	New York Convention on the Recognition and Enforcement of Foreign Arbitral Award
<b>No.</b>	number
<b>Prima facie</b>	description of something that appears to be true when you first consider it
<b>SIAC</b>	Singapore International Arbitration Centre
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>US</b>	United States
<b>v.</b>	versus



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## 案例表(Table of Cases)

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1983 710 F.2d 928 (2d Cir. 1983)

Bergesen v. Joseph Muller Corp

U.S. Court of Appeals, Second Circuit

17 June 1983.

Cited as: *Bergesen v. Joseph Muller Corp.*

1987 817 F.2d 326

National Iranian Oil Co. (Iran) v. Ashland Oil, Inc. (US)

U.S. Court of Appeals, Fifth Circuit

21 May 1987

Cited as: *National Iranian Oil Co. (Iran) v. Ashland Oil, Inc.*

2005 401 F.3d 701

Jacada (Europe), Ltd v. International Marketing Strategies, Inc.,

U.S. Court of Appeals, Sixth Circuit United States

18 March 2005

Cited as: *Jacada (Europe), Ltd v. International Marketing Strategies, Inc.*

2012 665 F.3d 1363, 1371 (D.C. Cir.2012)

Republic of Argentina v. BG Group PLC

U.S. Court of Appeals, District of Columbia Circuit United States

17 January 2012

Cited as: *Republic of Argentina v. BG Group PLC*



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